83-454

No. 83-_____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

STEVEN S. GLICK,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DENNIS A. FISCHER
Fischer & Hill
1448 - 15th Street
Suite 104
Santa Monica, CA 90404
(213) 451-4815

Attorney for Petitioner

QUESTIONS PRESENTED

1. Does the Sixth Amendment's guarantee of effective assistance of counsel entitle the defendant to adequate pretrial investigation and preparation by his trial attorney?

2. If so, may defense counsel's failure to conduct adequate pretrial investigation and preparation be excused on the basis of trial strategy and tactics despite the lack of sufficient information to enable counsel to make an informed and knowledgeable decision not to present evidence supporting the principal line of defense?

3. Did the Court of Appeals properly reject petitioner's claim of inadequate investigation and preparation by trial counsel in failing to obtain certain documentary evidence and expert testimony, notwithstanding the failure of counsel to provide such assistance, on the grounds that counsel's

trial strategy was apparently to convince the jury that such evidence would have been favorable to petitioner but was suppressed by the government, and that trial counsel was a criminal law specialist, a former prosecutor, and a member of the California Council of Criminal Justice who had been hired by the Justice Department to represent United States Attorneys charged with perjury?

Table of Contents

Table of Authorities

Table of Authorities
(Continued)

No. 83-_____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

STEVEN S. GLICK,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Steven S. Glick, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit rendered on June 10, 1983. This case presents

important questions of law concerning the duties of trial counsel to investigate and prepare the defense under the Sixth Amendment to the United States Constitution.

OPINION BELOW

The opinion of the Court of Appeals is reported at 710 F.2d 639, and is reproduced as Appendix A to this petition. The order of the Court of Appeals denying the Petition For Rehearing (unreported) is attached to this petition as Appendix B. The Court's order of August 17, 1983 granting petitioner's motion for stay of mandate until September 19, 1983 is attached to this petition as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was filed on June 10, 1983. The order of the Court of Appeals denying the Petition For Rehearing was made on July 27, 1983. This petition is timely filed within 60 days of

July 27, 1983. The jurisdiction of this Court is invoked under Title 28, United States Code section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Petitioner Steven S. Glick was charged by indictment filed in the United States District Court for the District of Colorado (D.Colo. No. 81-CR-92) with nine counts of mail fraud, 18 U.S.C. § 1341, and two counts of travel in interstate commerce to execute a scheme to defraud, 18 U.S.C. § 2314. It was further alleged that he aided and abetted each of the above crimes. 18 U.S.C. § 2. The charges against petitioner's two codefendants

were disposed of prior to trial (defendant Chisholm, by plea; defendant Pearce, by dismissal). Opinion at A-1 - A-3; Br. of Appellant at 2.

Petitioner appeared with counsel, attorney Harland W. Braun of Los Angeles, California, and entered pleas of not guilty. One count of mail fraud was dismissed on motion of the government prior to trial. Upon trial by jury, before the Honorable Zita L. Weinshienk, District Judge, petitioner was found guilty of all remaining charges. Petitioner was sentenced on each count to concurrent terms of five years imprisonment, all but six months of which were suspended, with a probation period of five years subsequent to release; full restitution was ordered as a special condition of probation. Br. of Appellant at 2. Petitioner's incarceration has been stayed pending appeal upon

posting of a bond.

The underlying facts of the fraudulent scheme were somewhat complex. Boiled down to its essentials, the evidence at trial established that during 1975 and 1976 Reginald Chisholm, a man of great charm and personal magnetism, masterminded a loan financing arrangement by convincing several Colorado residents that he was a very wealthy person who could package and obtain loans for amounts arranging from $5,000 to $20,000 upon payment of a nonrefundable "front" fee. Chisholm showed his victims financial statements describing his personal wealth and that of three corporations he owned or controlled. These statements were prepared by petitioner, a certified public accountant in California, and were accompanied by petitioner's declaration that the statements fairly presented the financial

positions of Chisholm and the respective corporations in conformity with generally accepted auditing standards and accounting principles. Opinion at A-4 - A-5; Br. of Appellee at 2-3; Br. of Appellant at 3-6.

The principal asset of Chisholm and his corporations was his claim to mineral rights in limestone formations located in National Forest lands. These rights had been transferred between Chisholm and his corporations, and were reflected by an increased valuation of the mining claims. The actual value of Chisholm's mineral rights, and the nature of his title to them, were major issues at petitioner's trial. The Government presented the testimony of two expert witnesses -- one, a geologist with the Department of Interior, indicated that the value of the claims was far below that shown on the financial statements; the other, a Denver, Colorado

Certified Public Accountant, asserted that the financial statements prepared by petitioner contained blatant violations of basic accounting principles. Opinion at A-5 - A-6; Br. of Appellee at 3-5; Br. of Appellant at 6-10.

Petitioner testified that before and during the time he had prepared the financial statements, four appraisals had been made that substantially supported the values contained in his statements. However, he was unable to remember the authors of or the details of the two earliest appraisals. The third report was prepared by one Smith, who was not a geologist and admittedly had an interest in the Chisholm business enterprises. Petitioner testified that, in fact, he had not accepted the Smith appraisal at face value because Smith lacked independence. But petitioner insisted that Smith's results had been verified by another independent real

estate appraiser, Goldring, who had based his evaluation on facts and figures supplied by Smith. Although the Smith report was admitted into evidence at trial, petitioner was unable to produce the Goldring report. Chisholm meanwhile had previously been convicted in a federal criminal proceeding in Portland, Oregon, on charges arising from other acts involving a similar fraudulent plan.

Chisholm had obtained a fifth appraisal in 1978 in preparation for his Portland trial. This preliminary evaluation, from a geologist named Stickel, indicated that one of the mineral claims contained sufficient limestone deposits to warrant consideration of commercial mining. This appraisal was admitted into evidence by stipulation of the parties, although Stickel himself was not called to testify.

Petitioner testified without dispute that he began performing accounting work for Chisholm many years before when Chisholm ran a school in Los Angeles; petitioner thought him to be an honest man. Chisholm had organized Trans-Universal Finance Company in 1974, for the purpose of presenting loan packages to lending institutions for its clients, and petitioner did some accounting work for the company at that time. However, after Chisholm moved to Las Vegas in 1975 or 1976, petitioner had less contact with Chisholm's business activities but continued to perform occasional work on essentially a long-distance basis when requested.

Petitioner testified that he knew Chisholm was obtaining packaging fees to organize presentable loan packages through Trans-Universal, and understood that the financial statements which he prepared were

helpful to Chisholm in making loan applications for his clients. In fact, petitioner was aware of four loans that Trans-Universal successfully obtained or guaranteed, a fact also confirmed by F.B.I. investigation.

Petitioner testified that he believed the limestone deposits were of considerable value to Chisholm, and agreed with the valuations of $53 million or $54 million made in the Smith and Goldring appraisals. Petitioner acknowledged his financial statements were inappropriate for the purpose of obtaining loans, but as indicated by the four loans Trans-Universal did facilitate, properly served as guarantee documents. Until Chisholm was subsequently indicted in Portland, Oregon, petitioner thought Chisholm's loan packaging business was entirely bona fide. Petitioner insisted he did not prepare the financial statements or

otherwise knowingly and intentionally participate with Chisholm in defrauding anyone or for a fraudulent purpose. Opinion at A-6 - A-8; Br. of Appellant at 10-14.

On appeal from his convictions, petitioner raised two issues: (1) that the district judge improperly instructed the jury on the issue of fraudulent intent by giving an instruction on "deliberate ignorance" which failed to satisfy the requirements of knowledge for aiding and abetting a scheme to defraud; and (2) that he was denied effective assistance of counsel because his trial attorney failed to conduct pretrial investigation and preparation to defend against the charges.

In its opinion filed June 10, 1983, the United States Court of Appeals for the Tenth Circuit rejected both contentions and affirmed the judgment below. The Court concluded that

an instruction on deliberate avoidance was appropriate under the facts, and that omission of preferable language suggested in United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc), cert. denied, 426 U.S. 951, and subsequent progeny, pertaining to the accused's awareness of a high probability of the existence of the fact in question unless he actually believes it does not exist, did not constitute reversible error because trial counsel failed to respond to the district court's repeated offers to modify the instruction to include appropriate language. Opinion A-8 - A-18.

In also rejecting petitioner's second ground for appeal, the Court of Appeals relied heavily on a case decided after oral argument, Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, June 6, 1983 (No. 82-1554), 33

Cr.L.Rptr. 4073. The Court first noted "the lack of any objective showing that the missing appraisals were available, credible, or favorable to Glick," opn. at A-22, as the record reflected "only Glick's self-serving statements as to the existence of the contents of the two early appraisals and the Goldring report." Absent evidence to the contrary, the Court presumed that counsel's decision not to produce such documents, "even if they were available, was a matter of trial strategy." Ibid.

The Court also concluded that defense counsel's determination not to call Stickel as a witness was a reasonable tactical decision. The Court reasoned that since counsel had read the transcript of Stickel's testimony at Chisholm's Portland trial, he was thus in a position to evaluate the benefits and drawbacks of calling Stickel in the present

matter. The Court also referred to Mr. Braun's speculation that Stickel's value as a witness might be affected because Chisholm still owed Stickel about $40,000. Opinion at A-22 - A-23.

Finally, although unsupported by objective information presented to the Court, note was taken of petitioner's trial counsel's background as "a criminal law specialist, a former prosecutor, and a member of the California Counsel of Criminal Justice" and that he "had been hired by the Justice Department to represent United States attorneys charged with perjury." Opinion at A-23 - A-24.

Based upon its review of the record, the Court therefore agreed with the government

> "that counsel's trial strategy was apparently to convince the jury that the Government had hidden witnesses and documents helpful to the defense. Moreover, the absence of the documents and testimony made it possible

> for counsel to imply to the jury that the evidence would have been favorable to Glick. We conclude on this record that Glick received effective assistance of counsel." Opn. at A-24.

Challenging these latter conclusions in a Petition For Rehearing, petitioner submitted his own affidavit as an appendix thereto in order to present several factual matters rebutting the Court's previous speculation concerning defense counsel's justification for his actions. Petitioner's affidavit specifically asserted that he asked counsel to contact both Chisholm and Stickel in order to obtain the missing documents and produce necessary affirmative defense evidence. Petitioner stated his belief that counsel did not read the transcript of Stickel's Portland testimony, that he had not conducted any serious investigation nor prepared to present defense witnesses or other supporting documentary evidence, but hoped simply to attack the

government's case through cross-examination and argument without verifying through discovery that favorable defense evidence was not available. Pet. Rhrg. Attachment at 1-3. However, rehearing was denied on July 27, 1983. Appendix B.

On August 17, 1983, the Court granted petitioner's motion for stay of its mandate pending timely application to this Court for certiorari. The mandate was ordered stayed until September 19, 1983, upon condition that if on or before that date a notice was filed with the Clerk of the Court of Appeals from the Clerk of the Supreme Court of the United States that a petition for writ of certiorari had been timely filed, the stay would continue until final disposition by this Court. Appendix C.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

THIS CASE PRESENTS A COMPELLING VEHICLE FOR THIS COURT'S RESOLUTION OF THE IMPORTANT QUESTIONS OF WHETHER THE SIXTH AMENDMENT'S GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL ENTITLES THE DEFENDANT TO ADEQUATE PRETRIAL INVESTIGATION AND PREPARATION BY HIS TRIAL ATTORNEY, AND THE NATURE AND EXTENT OF DEFENSE COUNSEL'S OBLIGATIONS BEFORE DETERMINING NOT TO PRESENT EVIDENCE SUPPORTING A PRINCIPAL LINE OF DEFENSE

A. Previous Decisions of This Court and the Courts of Appeals Imply and Appear to Recognize a Constitutional Duty of Trial Counsel to Conduct

Adequate Pretrial Investigation and Preparation.

It had long been settled by the decisions of this Court "that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel." Faretta v. California, 422 U.S. 806, 832 (1975). Describing "the road" travelled by the Court's opinions from Powell v. Alabama, 287 U.S. 45 (1932) to Arsinger v. Hamlin, 407 U.S. 25 (1972), Justice Blackmun's dissent in Faretta recalled that "from start to finish the development of the right to counsel has been based on the premise that representation by counsel is essential to ensure a fair trial." 422 U.S. at 851.

The nature and scope of the Sixth Amendment guarantee has proved more elusive to define in some contexts. The question

presented by the instant case -- whether trial counsel has a duty to investigate, and the parameters of such obligation -- apparently has yet to be addressed directly by this Court. Its resolution is of great importance to the administration of criminal justice in federal and state courts throughout this country, for as one court has explained, "Although the fate of a criminal defendant is determined at trial, the course of that trial can be decisively affected by actions of defense counsel in preparing the case." Washington v. Strickland, 693 F.2d 1243, 1251 (5th Cir. Unit B 1982) (en banc), cert. granted June 6, 1983, ____ U.S. ____ (No. 82-1554; 33 Cr.L.Rptr. 4073).

This Court has recognized that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot left to the mercies of incompetent

counsel." McMann v.Richardson, 397 U.S. 759, 771 (1970). That principle is particularly apt with respect to the adequacy of defense counsel's investigation of the case in preparation for trial. More than half a century ago, it was noted that

> "Even the intelligent and educated layman has small and sometimes no skill in the science of the law . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." Powell v. Alabama, supra, 287 U.S. at 69, quoted in Chief Justice Burger's dissenting opinion in Faretta v. California, supra, 422 U.S. at 838-39.

It should follow as a corollary to the above propositions that trial counsel's duties under the Sixth Amendment must extend to adequate investigation and preparation of the defense; petitioner urges this Court to expressly so hold.

B. Counsel's Failure to Conduct Adequate Pretrial Investigation and

Preparation of the Defendant's Principal Line of Defense Cannot Be Excused On the Basis of Trial Tactics Absent Sufficient Information to Make an Informed and Knowledgeable Decision Not to Obtain and Present Favorable Defense Evidence.

While it seems unremarkable to insist that "effective counsel conduct a reasonable amount of pretrial investigation," Washington v. Strickland, supra, 693 F.2d at 1251, it seems equally evident that "The amount of pretrial investigation that is reasonable defies precise measurement." Ibid. In United States v. Porterfield, 624 F.2d 122 (10th Cir. 1980), for example, the same court which decided the case at bar concluded that trial counsel had failed to render effective assistance by neglecting to conduct a pretrial investigation which might have uncovered

evidence for an entrapment defense; the Court of Appeals found it telling that counsel's neglect had violated one of the American Bar Association's fundamental principles of a defense attorney's duties to his client -- to conduct "prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt . . . ." Id., at 124, quoting section 4.1, ABA Standards of Criminal Justice.[1/]

The necessity for review and clarification of the nature of counsel's duty to conduct adequate investigation and prepara-

---

1/ The standard for measuring the effectiveness of counsel's assistance in this respect is identical whether the attorney has been appointed or retained by the defendant. See, e.g., Cuyler v. Sullivan, 446 U.S. 335 (1980); United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975), cert. denied, 423 U.S. 876. At no time has the government contended that petitioner's Sixth Amendment claim in this case is diminished because he was represented by private counsel.

tion before trial is illustrated by the Tenth Circuit's application of the principles set forth in Washington v. Strickland, supra, decided after oral argument herein and now before this court in light of the grant of certiorari. The Court of Appeals' opinion twice quotes from the discussion appearing under rubric 4 of Washington ("Counsel Fails to Conduct a Substantial Investigation Into One Plausible Line of Defense Because of His Reasonable Strategic Choice to Rely Upon Another Plausible Line of Defense at Trial"). 693 F.2d at 1256, 1257; see opinion at A-20 - A-21, A-23. Thus, prior to disposing of petitioner's contention that defense counsel should have sought the missing appraisals and the Goldring report to aid in preparation for trial, the Court sets out the following general reasoning:

> "An attorney's decision not to interview witnesses and to rely on other

> sources of information, if made in the exercise of professional judgment, is not ineffective counsel. Plant v. Wyerick, 636 F.2d 188, 189-90 (8th Cir. 1980). 'Whether to call a particular witness is a tactical decision and, thus, a "matter of discretion" for trial counsel.' United States v. Miller, 643 F. 713, 714 (10th Cir. 1981). Counsel is not inadequate in failing to call a witness whose testimony would only have been cumulative in nature. Id." Opinion at A-21 - A-22.

With all respect, petitioner suggests that the instant case is one of undoubtedly many which more properly fall within rubric 1 of Washington v. Strickland, in which "effective counsel would discern only one plausible line of defense to serve his client's interests." 693 F.2d at 1252; emphasis added. Unlike the situation analyzed in subheadings 3 through 5 of Washington -- where (to use the examples suggested by that court) an attorney might challenge both the racial composition of the jury venire and raise an alibi defense, or have to choose between an alibi

defense and urging that defendant's admitted conduct was justifiable -- in many cases there will be but one line of defense (e.g., insanity, alibi, or simply putting the government to its proof). Cf. Id. at 1253 with 1252. Petitioner suggests that the case at bar clearly involves the latter category.

In that respect it is totally consistent with Porterfield, supra, 624 F.2d 122, where trial counsel's failure to procure the attendance of a government informer as a defense witness in a narcotics prosecution deprived the defendant of the right to effective assistance of counsel because of the lack of due diligence in pretrial investigation. For the same reason, the analysis underlying the instant holding that counsel's "determination" not to call Stickel as a defense witness constituted "a reasonable tactical decision," opinion at A-23, citing Washington at 1255,

is similarly misplaced because the sole plausible line of defense being advanced necessarily required counsel to make a diligent and informed inquiry into whether Stickel would in fact be a favorable defense witness.

Mindful that this Court has granted certiorari in Washington, petitioner submits that principles not applied by the Court in the present case should be held applicable when only one plausible line of defense reasonably appears. Although defense counsel herein urged the jury generally that the government had not proved its case, the crux of the defense mounted by Mr. Braun clearly was focused upon and limited to the sole question in dispute -- whether petitioner had the intent to defraud requisite to the charged crimes, or merely was guilty of acute negligence and poor judgment for which no

criminal sanctions were authorized. In such instance, Washington concluded that

> "Effective counsel is obliged to conduct a reasonably substantial investigation into that line [of defense] before proceeding to trial. The failure to perform such an investigation is a clear example of a breach of duty to investigate." Id. at 1252.

Moreover, it seems clear that if there is but one plausible line of defense to be asserted, "an attorney can no more make a strategic decision that renders unnecessary an investigation of [that] defense than he can make a strategic decision to plead guilty against his client's wishes." Ibid. As such, "permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a defendant's one plausible line of defense." Id.; emphasis added.

The foregoing views are shared by other courts which have addressed the subject. In

the frequently cited decision of United States v. DeCoster, 487 F.2d 1197 (D.C.Cir. 1973), subsequent opinion en banc after remand, 624 F.2d 196 (1979), the Court followed the approach adopted earlier in Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968), cert. denied, 393 U.S. 849, where it was recognized that counsel should be guided by "the legal profession's own articulation of guidelines for the defense of criminal cases" set forth in the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Defense Function (App. Draft 1971). 487 F.2d at 1203. Specifically, counsel's duties to his client in investigating and preparing for trial were summarized as follows:

> "(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that 'all

> available defenses are raised' so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research." Id. at 1204; footnotes omitted.

In light of the above authorities, it cannot be gainsaid that the Sixth Amendment's guarantee of effective assistance of counsel focuses its inquiry upon counsel's performance, thereby avoiding "the misleading implication that what occurred at the trial and appears on the face of the record is all that is relevant." Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc) cert. denied, 440 U.S. 974 (1979). An assertion that trial counsel failed to conduct adequate pretrial investigation in

preparation for defending the accused may be shown to be justified on the basis of trial strategy and tactics, but not where counsel has failed to perform reasonably substantial investigation into the single plausible line of defense to be asserted at trial. The essence of an informed and knowledgeable decision not to present evidence supporting the principal line of defense is the possession of sufficient information, following such factual and legal investigation as is appropriate, both as to prosecution and defense witnesses. It includes, as in this case, the seeking and securing of documents and possible testimony connected with a codefendant or otherwise accessible to the defense through independent means.

As will now be explained in section II, such duty clearly arose in the present matter, and this Court therefore should

decide whether the Court of Appeals correctly found counsel's deficient performance excusable because of trial tactics and counsel's prior experience in other cases.

II

THE COURT OF APPEALS ERRONEOUSLY REJECTED PETITIONER'S CLAIM OF INADEQUATE INVESTIGATION AND PREPARATION BY TRIAL COUNSEL ON THE GROUNDS THAT HIS FAILURE TO OBTAIN POTENTIALLY FAVORABLE DOCUMENTS AND EXPERT TESTIMONY WERE THE RESULT OF TRIAL STRATEGY TO CONVINCE THE JURY THAT SUCH NON-PRODUCED EVIDENCE WOULD HAVE BEEN FAVORABLE TO PETITIONER BUT WERE SUPPRESSED BY THE GOVERNMENT, AND THAT COUNSEL WAS EXPERIENCED AS A CRIMINAL LAW SPECIALIST AND FORMER PROSECUTOR WHO HAD BEEN HIRED

TO REPRESENT UNITED STATES ATTORNEYS CHARGED WITH PERJURY

An equally important question for review by this Court is the propriety of the standards and factors applied by the Court of Appeals in evaluating petitioner's claim of ineffective assistance of counsel based upon inadequate trial preparation. The opinion below rejects petitioner's contentions as to the existence and contents of the two early appraisals and the Goldring report as "self-serving," yet in the very next page accepts trial counsel's self-serving statements made for the purpose of securing admission to practice before the District Court, reciting his experience as a criminal law specialist, a former prosecutor, and a member of the California Council of Criminal Justice who has been hired by the Justice Department to represent United States attorneys charged

with perjury. Opinion at A-23 - A-24. The Court further defers to counsel's unsupported conjecture that Stickel would have questionable value as a witness for petitioner because Chisholm still owed him money, and relies upon speculation by the government that counsel's trial strategy was to make the government look bad by implying that helpful witnesses and documents had been suppressed. Id. at A-23.

Petitioner respectfully submits that the foregoing are improper criteria for measuring the adequacy for constitutional purposes of counsel's preparation for trial. When the record reflects, as it does here, that trial counsel has failed to conduct a substantial investigation into the sole major line of defense, the Sixth Amendment guarantee of effective assistance of counsel is not satisfied simply because a properly prepared

attorney might have made similar tactical decisions based upon informed and knowledgeable assumptions.

The question of the correct standard for reviewing claims of inadequacy of counsel due to lack of preparation of the defense has divided the courts, and is apparently among the issues presented for resolution by this Court's granting of certiorari in Washington v. Strickland, supra, 693 F.2d 1243, cert. granted sub nom. Strickland v. Washington, No. 82-1554. Petitioner's position herein echoes the observation of Judge Frank M. Johnson, Jr., in Washington, that absent explicit evidence of a tactical reason for non-investigation, there is nothing inconsistent in expecting defense counsel to conduct necessary investigation while pursuing a trial strategy that seeks to take best advantage of such potential evidence even if

it turns out to be unavailable or unfavorable. 693 F.2d at 1283-84. In concluding that "the absence of the documents and testimony made it possible for counsel to imply to the jury that the evidence would have been favorable to Glick," opinion at A-24, surely the Court of Appeals did not mean to exalt lazy or indifferent preparation at the expense of an informed decision made with knowledge that such evidence is or is not favorable to the defense. Had counsel conducted meaningful investigation and determined that its fruits (or lack thereof) would be harmful to petitioner's defense, he still could have argued "that the Government had hidden witnesses and documents helpful to the defense," ibid.; but then at least that position would have been the result of a knowledgeable tactical decision.

The present case thus presents a compel-

ling record for resolution of the thorny question of how appellate courts should review claims of ineffective assistance of counsel when the only basis for concluding that the failure to perform the duty of investigation and preparation arises from conjecture and speculation as to counsel's trial strategy.2/

2/ In adverting to the self-serving nature of petitioner's statements as to the existence and contents of the missing appraisals, opinion at A-22, the Court of Appeals seems to have overlooked evidence highlighted in the government's brief that appellant stated on cross-examination that he had been a witness at Chisholm's 1978 trial in Portland, where he testified that he had possessed three appraisals (naming the authors as Smith, Reynolds, and Goldring) among his working papers which he had given to the defense attorney representing Chisholm. Brief of Appellee at 22-24, citing Rec., vol. III, at 478-81.

The Court's opinion also ignores defense counsel's seemingly sincere protestations that he fully expected the government to call Stickel as its witness because he was on the prosecution's witness list. While counsel claimed to have read the transcript of

(Footnote continued on next page.)

However, an additional consideration clouds the Court of Appeals' analysis of that issue. The absence of specific, objective data pertaining to the reasons for the omissions and neglect of counsel in this case is exacerbated by the Court's observation that counsel "is a criminal law specialist, a former prosecutor, and a member of the California Council of Criminal Justice . . . [and] had been hired by the Justice Department to represent United States Attorneys charged with perjury." Opinion at A-23 - A-24. Petitioner respectfully submits that reliance on these factors -- extraneous and

---

Footnote 2 Continued:

Stickel's testimony at the Chisholm trial, his failure to contact Stickel and ascertain for himself whether Stickel would be a cooperative and helpful witness seems utterly inexcusable. Indeed, the lame suggestion that Stickel might somehow prove to be a less than friendly witness for petitioner because Chisholm still owed him money hardly qualifies as a sound tactical decision if unsupported by a shred of confirmation.

irrelevant to counsel's performance in this case -- is ordinarily inappropriate, and was unwarranted as a basis for finding no Sixth Amendment violation by counsel here.

The Court's curious resort to information concerning defense counsel's legal background and experience apparently had its genesis in Mr. Braun's statements to the district judge, made for purpose of securing admission to practice before the trial court. Rec., Motions Hrg. Nov. 23, 1981, at 11-13. Quite aside from the informal and manifestly self-serving nature of counsel's statements at that proceeding, and the lack of any other indication in the record concerning counsel's background, no question has been raised at anytime on this appeal about Mr. Braun's individual qualifications or experience as a criminal defense attorney in general. Nor is that properly an issue when a Sixth Amend-

ment contention is advanced. The correct focus should be upon the adequacy and effectiveness of counsel's representation of petitioner in this particular case.

An example of the proper approach may be found in the somewhat notorious case of United States v. Hearst, 466 F.Supp. 1068 (N.D. Cal. 1978), affd. 638 F.2d 1190 (9th Cir. 1980), in which the district and appellate courts reviewed questions concerning the effectiveness of the assistance rendered by perhaps the nation's most well-known criminal trial lawyer. See 466 F.Supp. at 1081. As recognized in Hearst, the issue before the court when the adequacy of trial counsel's conduct has been questioned is not the general competence of that attorney. See also Washington v. Strickland, supra, 693 F.2d at 1284, in 16, Frank M. Johnson, Jr., J., conc. and diss. Indeed, to

conclude otherwise would forever immunize attorneys who have passed a certain threshold of trial experience from challenges to deficient performance in individual cases. Neither case authority nor human experience support that result. Hence the Court of Appeals erred in placing partial reliance upon the extraneous and irrelevant consideration of trial counsel's background.[3/]

Because the Court of Appeals rejected

3/ Moreover, grave problems would arise if trial counsel's experience in prior unrelated cases routinely became an element in assessing the adequacy of trial counsel's performance in the action before the Court. Challenges to less experienced, often younger lawyers might well be encouraged; on the other hand, attorneys with substantial experience would have less incentive to exercise diligence because less vulnerable to attack. Both sides might be tempted to produce "experts" or introduce collateral evidence on the subject of an attorney's experience and skill. Such challenges to an attorney's competency would place him in an adversary position vis-a-vis his former client because of the need to protect his reputation in the legal community.

petitioner's inadequacy-of-counsel contention, it did not further address the showing of prejudice required for reversal -- an issue now before the Court in Strickland v. Washington, supra. However, even if the Washington court erred in holding that the defendant need not demonstrate actual prejudice resulting from inadequate assistance, in order to establish the right to a new trial in a habeas corpus proceeding reviewing a state conviction, petitioner suggests that the appropriate disposition of his appeal would be to remand the cause for further proceedings in the district court. In fact, having recognized the split of authority on the issue of prejudice noted in the various opinions cited in Washington itself, petitioner urged the Court of Appeals to return the matter to the trial court for the purpose of obtaining trial counsel's direct explanation and permit-

ting the trial judge to assess the existence of prejudice in the event she found petitioner's Sixth Amendment claim well founded. Petition for Rehearing at 7-9. In view of the Court of Appeal's skepticism concerning the unproduced appraisals, and its speculation that counsel determined not to call Stickel as a defense witness for undisclosed tactical reasons, petitioner sought to dispel the impression of clever trial advocacy by submitting, as an appendix to the Petition for Rehearing, petitioner's Affidavit under oath, to refute the perception of informed rejection by counsel of less favorable alternatives. See United States v. Golub, 638 F.2d 185, 190-91 (10th Cir. 1980). The allegations therein,[4/] if found true, might well persuade

---

4/ In his Affidavit attached to the Petition for Rehearing, petitioner asserts that notwithstanding his payment of a substantial

(Footnote continued on next page.)

a trial judge with second thoughts about the adequacy of defense counsel's representation that a new trial is necessary.

Unlike other instances in which prejudicial error is assessed on appeal, where the

---

Footnote 4 Continued:

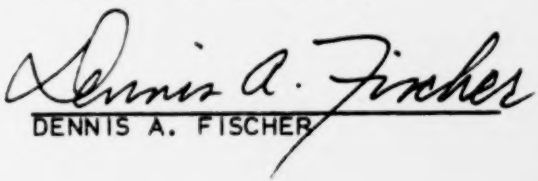
retainer to trial counsel, Mr. Braun failed to conduct discovery or undertake private investigation concerning the whereabouts and contents of the missing appraisals and other information not otherwise readily accessible from the files of the United States Attorney or from co-counsel in Denver, Colorado. Petitioner's declaration further indicates his understanding that the two earliest appraisals and the Goldring report were not produced at trial because counsel did nothing to obtain them. In addition, petitioner states his belief that counsel never spoke to Stickel, and perhaps did not even read the transcript of his testimony at Chisholm's Portland, Oregon trial. Counsel led petitioner to believe that the matter would be dismissed by the United States Attorney, or disposed of without trial, probably following a plea of guilty by Chisholm; but neither result materialized. Thus when the matter proceeded to trial, petitioner alleges counsel was ill-prepared to go forward and proceeded to try the case by the "seat of his pants."

issue pertains to the inadequacy of trial counsel's representation and the trial judge has had the benefit only of a one-sided presentation because the issue was not fully explored at that level, petitioner believes that upon a showing of deprivation of the constitutional right to effective assistance of counsel interests of justice ordinarily will be best served by remanding the cause to the trial court for its initial determination of whether the defendant suffered prejudice under the circumstances of that particular case. Accordingly, petitioner does not seek direct reversal of his conviction by this court for purpose of a new trial, but rather repeats his suggestion that a limited remand be ordered for further proceedings in light of the foregoing considerations.

CONCLUSION

The failure of defense counsel to properly investigate and prepare for trial deprived petitioner of the effective assistance of counsel under the Sixth Amendment. The Petiton for Writ of Certiorari should be granted to review the important questions raised herein, and upon decision the matter should be remanded to the district court for further proceedings.

Respectfully submitted,



DENNIS A. FISCHER

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STEVEN S. GLICK,
Defendant-Appellant.

No. 82-1375

Appeal from the United States District Court for the District of Colorado (D.C. No. 81-CR-92).

Before SETH, Chief Judge, BREITENSTEIN, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Steven Glick was convicted after a jury trial of eight counts of mail fraud, 18 U.S.C. § 1341 (1976),[1/] and two counts of travel in

---

1/ 118 U.S.C. § 1341 (1976) provides:
"Whoever, having devised or intending to devise any scheme or

(Footnote continued on next page.)

interstate commerce to execute a scheme to defraud, 18 U.S.C. § 2314 (1976).[2] On

---

Footnote 1 continued:

> artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any port office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

2/ 18 U.S.C. § 2314 (1976) provides in pertinent part.

(Footnote continued on next page.)

appeal, Glick argues that the court improperly instructed the jury on the issue of fraudulent intent, and that he was denied effective assistance of counsel because his attorney failed to conduct adequate pretrial investigation. We affirm.

Footnote 2 continued:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; . . .
>
> ". . .
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Glick was also charged under 18 U.S.C. § 2(a) (1976) with aiding and abetting the above crimes.

I.

THE FACTS

Viewed in the light most favorable to the Government, see United States v. Petersen, 611 F.2d 1313, 1317 (10th Cir. 1979), cert. denied, 447 U.S. 905 (1980), the facts are briefly as follows. Reginald Chisholm, the mastermind of the fraudulent scheme, was described as a man of great charm and personal magnetism. He held himself out during 1975 and 1976 as a very wealthy person who could package and obtain loans for people seeking financing. He charged a nonrefundable front fee for this service. Chisholm told his victims that as part of his service he would guarantee the loans, and that his guarantee would carry weight with lending institutions because of his wealth. To support these representations, Chisholm showed his victims financial statements describing

Chisholm's personal wealth and that of three corporations he owned or controlled. These statements were prepared by Glick, a certified public accountant, and included letters by Glick declaring that the statements fairly presented the subject's financial position in conformity with generally accepted auditing standards and accounting principles.

The principal asset of Chisholm and his corporations was his claim to mineral rights in limestone formations in National Forest lands. These rights had been transferred by Chisholm to one of his corporations, and then from corporation to corporation, each transfer resulting in an increased valuation of the mining claims.

Chisholm and Glick were indicted, and Chisholm pled guilty prior to trial. Chisholm had previously been convicted in a federal criminal proceeding in Portland, Oregon, on

charges apparently arising from other acts involving the same fraudulent plan.

The actual value of Chisholm's mineral rights, and the nature of his title to them, were major issues at Glick's trial. The testimony of the Government's expert, a geologist with the Department of Interior, indicated that the value of the claims was far below that shown on the financial statements. He stated that Chisholm faced insurmountable obstacles in any effort to mine the limestone or to obtain the fee simple title necessary for a proposed real estate development.

Glick testified that before and during the time he had prepared the financial statements, four appraisals had been made that substantially supported the values contained in the statements. Glick was unable to remember the authors or the details of the two earliest appraisals. The third report was

prepared by a real estate appraiser, Smith, who was not a geologist and had an interest in the Chisholm business enterprises. Glick testified that he had not accepted the Smith appraisal at face value because Smith was not independent. Glick stated that Smith's results had been verified by another independent real estate appraiser, Goldring, who had based his evaluation on facts and figures supplied by Smith. Although the Smith report was admitted into evidence, Glick was unable to produce the Goldring report.

Chisholm had obtained a fifth appraisal in 1978 in preparation for his Portland trial. This preliminary evaluation, from a geologist named Stickel, stated that one of the mineral claims contained sufficient limestone deposits to warrant consideration of commercial mining. This appraisal was admitted into evidence by stipulation of the parties, although

Stickel himself did not testify.

The Government presented expert testimony that the financial statements prepared by Glick contained blatant violations of basic accounting principles. Glick himself had conceded that no lending institution would furnish a loan based on the Chisholm financial statements. Glick testified that he knew Chisholm was obtaining fees by presenting the financial statements to people, claiming that the documents could be used to back up loan applications. However, Glick testified that he believed the limestone deposits were of considerable value to Chisholm, and that he thought Chisholm's loan packaging business was bona fide when he prepared the financial statements.

II

THE INTENT INSTRUCTIONS

"Mail fraud is a specific intent crime.

The government is required to prove beyond a reasonable doubt that the defendant intended to defraud." United States v. Martin-Trigona, 684 F.2d 485, 492 (7th Cir. 1982). The district court gave the following instruction on deliberate ignorance as part of its charge on the type of knowledge which satisfies the requisite fraudulent intent:

> "However, the element of knowledge may be established by proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him. In other words, the requirement that the defendant has acted knowingly does not mean that the defendant needed to have positive knowledge. If the defendant failed to have positive knowledge only because he conscientiously avoided acquiring it, the requirement of knowledge is satisfied."

Rec., vol. VIII, at 673. On appeal, Glick contends that this instruction is an erroneous formulation of the law because it permitted the jury to convict upon proof of a lesser degree of knowledge than that required by

the statute.

In recommending the use of a deliberate ignorance instruction, this court has pointed out that "[w]hile negligence is not sufficient to charge a person with knowledge, one may not wilfully and intentionally remain ignorant of a fact, important and material to his conduct, and thereby escape punishment. The test is whether there was a conscious purpose to avoid enlightenment." Griego v. United States, 298 F.2d 845, 849 (10th Cir. 1962) (footnotes omitted). Thus, the type of instruction at issue here may be given when the evidence points to deliberate ignorance and conscious avoidance of actual knowledge. See United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982); United States v. Ciampaglia, 628 F.2d 632, 642-43 (1st Cir.), cert. denied, 449 U.S. 956, 449 U.S. 1038 (1980); United States v. Brien, 617 F.2d 299,

312 (1st Cir.), cert. denied, 446 U.S. 919 (1980); United States v. Batencort, 592 F.2d 916, 918 (5th Cir. 1979).

Glick argues that giving a deliberate ignorance instruction was inappropriate in light of the evidence presented at trial. This argument is apparently based on Glick's assertion that the record does not contain sufficient evidence of his willful ignorance in the face of facts known to him that would have made obvious the existence of the fraudulent scheme.

In denying Glick's motion for directed verdict, the trial judge determined that the instruction was proper because a reasonable juror could find that Glick had intentionally remained ignorant despite his subjective awareness of facts plainly indicating the fraudulent nature of Chisholm's business. The court specifically noted evidence of Glick's

numerous blatant violations of accounting principles and auditing standards, his belief in 1975 that the mineral claim evaluations were unrealistic, his acknowledgment that no one would give a loan on the basis of the financial statements, his knowledge that fees were obtained for packaging loans which would likely not go through, and his knowledge of the nature of the corporate financial activities. This evidence is sufficient to enable a jury to find beyond a reasonable doubt that Chisholm's loan packaging business was a fraudulent scheme from its inception, and that Glick either knew it or deliberately avoided acquiring positive knowledge. Accordingly, we conclude that an instruction on deliberate avoidance was appropriate. See Griego, 289 F.2d at 849.

Glick also argues that even if a deliberate ignorance instruction was warranted, the

form of the instruction given in this case was inadequate because it failed to require the jury to find that "the defendant was subjectively aware of a high probability of the existence of the fact whose knowledge is imputed, and that knowledge of that fact may not be imputed if the defendant actually believed that such fact did not exist." Brief of Appellant at 17. To insure that a defendant is only convicted if his ignorance is willful, rather than negligent, the preferable form of the instruction informs the jury, in addition to the charge given in this case, "(1) that the required knowledge is established if the accused is aware of a high probability of the existence of the fact in question, (2) unless he actually believes it does not exist." United States v. Jewell, 532 F.2d 697, 704 n.21 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); see also

United States v. Aulet, 618 F.2d 182, 190-91 (2d Cir. 1980). Glick urges that the court's failure to add this language to its charge is grounds for reversal. We disagree.

In response to counsel's general objection to the instruction, the district court repeatedly offered to modify the instruction if counsel wishes to propose a language change.[3/] Defense counsel reponded that his

---

3/ Specifically, the court said:

"THE COURT: I am happy to change the language. I think the plaintiff is entitled to this theory. If you want to switch it around a little better, take some other language from one of these cases, I am happy to do it.

"MR. BRAUN: I don't think they are entitled. I think I will go further than that. I don't think they are entitled to that theory. I don't think the Jewell case is good authority for that. I think the case is -- you know -- maybe we should say the fundamental problem with citing cases for jury instructions is that a court writes a decision with one

(Footnote continued on next page.)

objection was not to the language of the instruction, but to the propriety of such an instruction in any form. Because Glick failed to suggest to the trial court the language he now claims was erroneously omitted, we may reverse only if the omission constitutes plain error. Fed. R. Crim. P. 52(b).

The jury was instructed that Glick could not deliberately close his eyes to what would otherwise be obvious to him, that he could

---

Footnote 3 continued:

> purpose in mind and one state of the law and we prepare a jury instruction for the purpose of instructing laymen as to what their duties as jurors are.
>
> "THE COURT: I have no problem in modifying it, if you will give me the suggested language. I think the theory is proper for this case; but I am happy to change the language."

Rec. vol. VIII, at 559-60.

> "THE COURT: I would be happy to take the quote right out of [Jewell], if you would like to take the quote out of that case."

Id. at 582.

not be convicted for an act done because of mistake, accident, or innocent reason, and that he was innocent even if he prepared fraudulent financial statements if he did not intentionally and knowingly participate in the scheme or artifice to defraud.[4/] Although

---

4/ The court instructed as follows on the definition of "knowingly":

> "An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.
>
> "The purpose of adding the word 'knowingly' is to ensure that no one would be convicted for an act done because of mistake or accident or innocent reason."

Rec., vol. VIII, at 670. It then instructed on fraudulent intent and deliberate ignorance:

> ". . . . In order to convict the defendant in this case, you must find that he acted knowingly.
>
> "It is not necessary, however, for the Government to prove that the defendant was aware of every detail of the alleged scheme to defraud, so long as you find beyond a reasonable doubt that he was a knowing participant in the scheme.

(Footnote continued on next page.)

Footnote 4 continued:

> "It is not sufficient for you to find beyond a reasonable doubt that Mr. Glick knew the financial statements were used to guarantee loans, since such transactions are legal. For you to convict Mr. Glick, you must find beyond a reasonable doubt that he was aware of the fraudulent aspects of the transactions.
>
> "However, the element of knowledge may be established by proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him. In other words, the requirement that the defendant has acted knowingly does not mean that the defendant needed to have positive knowledge. If the defendant failed to have positive knowledge only because he conscientiously avoided acquiring it, the requirement of knowledge is satisfied.
>
> ". . . .
>
> "THE COURT: It is not sufficient to merely prove that Steven Glick prepared fraudulent financial statements. The prosecution must also prove beyond a reasonable doubt that Mr. Glick knowingly participated in the scheme or artifice involved in this case. Thus, if you find that Mr. Glick prepared fraudulent financial statements but did not intentionally and knowingly participate in the scheme or artifice involved in this case, you must find him not guilty."

Id. at 672-73.

inclusion of the omitted language would have been preferable, the omission in this case did not constitute plain error. See United States v. Cincotta, 689 F.2d 238, 243-44 (1st Cir.), cert. denied, 103 S. Ct. 347 (1982); United States v. Eaglin, 571 F.2d 1069, 1074-75 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978); Jewell, 532 F.2d at 704 n. 21.

III.

ADEQUACY OF COUNSEL

Glick claims he was denied effective assistance of counsel because his trial attorney[5/] allegedly failed to conduct adequate pretrial preparation and was therefore unable to present an effective defense at trial. Glick points specifically to counsel's failure both to investigate the existence and nature of the

---

5/ Glick is represented by different counsel on appeal.

two earliest mineral appraisals and the Goldring appraisal, and to determine the possibility of obtaining favorable independent expert testimony from Stickel concerning the value of the limestone.

"The Sixth Amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney." Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc), cert. denied, 445 U.S. 945 (1980). In considering an allegation of incompetent counsel, the court must first determine whether the attorney's performance fell below this standard. The court must then determine whether the inadequacy "has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense." United States v. Morrison, 449 U.S.

361, 365 (1981).[6/]

The proper standards for evaluating a claim of ineffective assistance of counsel based upon allegations of inadequate trial preparation were recently addressed in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (en banc), petition for cert. filed, 51 U.S.L.W. 3704 (U.S. Mar. 21, 1983) (No. 82-1554). Effective counsel must "conduct a reasonable amount of pretrial investigation," Id. at 1251, which "will necessarily depend upon a variety of factors including the number of issues in the case, the relative complexity of those issues, the strength of

---

6/ Because of our conclusion that Glick has failed to establish trial counsel ineffectiveness, we need not decide what degree of prejudice must be shown. See generally, e.g., Washington v. Strickland, 693 F.2d 1243, 1258-63 (opinion of the court), 1270-74 (Tjoflat, J., concurring), 1287-88 (Roney, J., dissenting) (5th Cir. 1982) (en banc).

the government's case, and the overall strategy of trial counsel." Id.

"[A]n attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable." Id. at 1256. "Courts presume, in accordance with the general presumption of attorney competence, that counsel's actions are strategic." Id. at 1257; see Dupree v. United States, 606 F.2d 829, 830 (8th Cir. 1979) (per curiam), cert. denied, 445 U.S. 919 (1980). An attorney's decision not to interview witnesses and to rely on other sources of information, if made in the exercise of professional judgment, is not ineffective counsel. Plant v. Wyrick, 636 F.2d 188, 189-90 (8th Cir. 1980). "Whether to

call a particular witness is a tactical decision and, thus, a 'matter of discretion' for trial counsel." United States v. Miller, 643 F.2d 713, 714 (10th Cir. 1981). Counsel is not inadequate in failing to call a witness whose testimony would only have been cumulative in nature. Id.

In applying the above standards to the allegations before us, we note the lack of any objective showing that the missing appraisals were available, credible, or favorable to Glick. We have only Glick's self-serving statements as to the existence and contents of the two early appraisals and the Goldring report. Moreover, we will presume in the absence of any evidence to the contrary that counsel's decision not to produce the documents, even if they were available, was a matter of trial strategy.

We also conclude that defense counsel's

decision not to call Stickel as a witness was a question of trial tactics. The Stickel report, which tended to support Glick's assertion that the limestone was valuable, was admitted into evidence. Counsel stated to the court that he was unsure of Stickel's value as a witness for Glick because Chisholm still owed Stickel about $40,000. Counsel had read the transcript of Stickel's testimony on behalf of Chisholm in the Portland trial, and was thus in a position to evaluate the benefits and drawbacks of calling Stickel to testify for Glick. Under these circumstances, the determination not to call Stickel for the defense was a reasonable tactical decision. See Washington v. Strickland, 693 F.2d at 1255. We have considered Glick's other allegations of inadequacy and find them unpersuasive.

Finally, we note that Glick's trial coun-

sel is a criminal law specialist, a former prosecutor, and a member of the California Council of Criminal Justice. He had been hired by the Justice Department to represent United States Attorneys charged with perjury.

After reviewing the record, we agree with the Government that counsel's trial strategy was apparently to convince the jury that the Government had hidden witnesses and documents helpful to the defense. Moreover, the absence of the documents and testimony made it possible for counsel to imply to the jury that the evidence would have been favorable to Glick. We conclude on this record that Glick received effective assistance of counsel.

AFFIRMED.

APPENDIX B

APPENDIX B

MAY TERM - July 27, 1983

Before Honorable Oliver Seth, Honorable Jean S. Breitenstein and Honorable Stephanie K. Seymour, Circuit Court Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 82-1375
vs.	)	
	)	
STEVEN S. GLICK,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

/S/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX C

APPENDIX C

JULY TERM - August 17, 1983

Before Honorable Oliver Seth, Honorable Jean S. Breitenstein and Honorable Stephanie K. Seymour, Circuit Court Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 82-1375
vs.	)	
	)	
STEVEN S. GLICK,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's motion for stay of mandate in the captioned cause pending timely application to the Supreme Court for certiorari.

Upon consideration whereof, the motion for stay of mandate is granted. The motion shall be stayed until September 19, 1983, pending certiorari, and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that

appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk

By /S/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk